FILE COPY

Office Supreme Court
FILED
OCT 10 192
CHARLES ELMORE C

Supreme Court of the United States

October Term 1929.

No. 402.

UNITED STATES OF AMERICA,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, et al.,

Respondents.

JOINT BRIEF OF MORTGAGE TRUSTEES AND PREFERRED CREDITORS OPPOSING PETITION FOR WRIT OF CERTIORARI.

EDWIN S. S. SUNDERLAND,
15 Broad Street,
New York City, New York,

WARREN S. CARTER,
1512 Merchants National Bank Bldg.,
St. Paul, Minnesota,
Solicitors for Guaranty Trust Company,
Respondent.

HENRY V. POOR,
80 Broadway,
New York City, New York,

FREDERICK G. INGERSOLL,
1401 Merchants National Bank Bldg.,
St. Paul, Minnesota,
Solicitors for Central Union Trust Company,
Respondent.

JOSEPH M. HARTFIELD,
JESSE E. WAID,
14 Wall Street,
New York City, New York,
NORTON M. CROSS,
KENNETH TAYLOR,
1010 Security Building,
Minneapolis, Minnesota,
Solicitors for New York Trust Company,
Respondent.

JAMES H. McINTOSH,
120 Broadway,
New York City, New York,
CHARLES BUNN,
1006 Merchants National Bank Bldg.,
St. Paul, Minnnesota,
Solicitors for Bankers Trust Company,
Respondent.

EDWARD H. BLANC,
22 Exchange Place,
New York City, New York,
JAMES C. OTIS,
422 Endicott Building,
St. Paul, Minnesota,
Solicitors for Farmers Loan & Trust Company,
Respondent.

MORTIMER H. BOUTELLE,
New York Life Building,
Minneapolis, Minnesota,
Solicitor for W. H. Kalbach and Clara Sheriff, as Executors of the Estate of H. H. Sheriff,
Respondent.

INDEX.

Page.

Introduction 1

I. As to Mortgage Bondholders 5

II. As to Preferred Creditors 7

III. As to General Creditors 9

Conclusion 10

CITATIONS.

Brent v. Bank of Washington, 10 Pet. 596..... 5

Conard v. Atlantic Ins. Co., 1 Pet. 386 5

Cottrell v. Pierson, 12 Fed. 805 6

Field v. United States, 9 Pet. 182..... 5

Fosdick v. Schall, 99 U. S. 252 7

Gregg v. Metropolitan Trust Co., 197 U. S. 183..... 7

Jacob Richardson, 9 Opinions Attorney General 28..... 6

Savings & Loan Society v. Multnomah County, 129 U. S. 421 6

Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257. 7

Schmidtman v. Atlantic Phosphate & Oil Corp., 230 Fed. 769 6

Virginia & Atlantic Coal Co. v. Central Railway & Banking Co., 170 U. S. 355..... 7

United States v. Delaware Ins. Co., Fed. Cas. 14,942..... 6

United States v. Duncan, Federal Cases 15,003..... 6

United States v. Griswold, 8 Fed. 496..... 6

United States v. Hooe, 3 Cranch 73..... 5

United States v. Lewis, Federal Cases 15,595..... 6

United States v. Sheriff of Charleston, Federal Cases 16,276 6

1 Stat. at Large 515 6

R. S. sec. 3466 (U. S. C. Title 31, § 191).....1, 3, 6

Supreme Court of the United States

October Term 1929.

No. 402.

UNITED STATES OF AMERICA,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, et al.,

Respondents.

JOINT BRIEF OF MORTGAGE TRUSTEES AND PREFERRED CREDITORS OPPOSING PETITION FOR WRIT OF CERTIORARI.

This case presents several questions, namely, whether in the distribution of the assets of an insolvent railroad company in receivership the United States is entitled under Section 3466 R. S. to priority in payment of debts due it from that company over indebtedness due (1) bondholders secured by prior recorded mortgages; (2) preferred creditors, (3) general creditors.

Although the questions as to the relative priority of the United States and each of the classes named are separate and distinct questions, this brief is filed jointly by the mortgage trustees and the preferred creditors.

The rules governing applications for certiorari have been stated in so many instances as to require neither repetition or citation of the cases. It has never been suggested that in the application of these rules, the Government stands in any different position from that of any other suitor before the Court.

Nothing more than the most casual reference to the issues in the instant case is required to demonstrate that the pending application is without merit and that the questions sought to be urged on the Court's consideration are largely of moot significance. The determinative principles of law involved have, for the most part, been settled by an unbroken line of decisions by this and the inferior courts of the United States extending back over a century.

The circumstance that collateral issues are suggested (though in no wise necessary to the determination of the case), the decision of which might prove of advantage in other prospective litigation, is of no materiality. It is a novel concept that recourse to certiorari may be had with the objective purpose of eliciting advisory opinions from the Court.

In the present case, the facts, summarized, disclose that the Minneapolis & St. Louis Railroad Company was placed in the hands of a receiver by the United States District Court of Minnesota in July, 1923. The original suit was instituted by unsecured creditors. At the time the receiver was appointed, the property of the defendant railroad was encumbered by a series of mortgages, the validity of which is undisputed. All of these mortgages, with the liens consequent thereon, long ante-dated the claims of the Government. Foreclosure pro-

ceedings were subsequently instituted with the usual orders extending the previous receivership and consolidating the causes.

In the regular course of these proceedings, the Government filed a series of claims arising upon obligations of the defendant railroad created under the Federal Control and Transportation Acts. The character of these claims is sufficiently set forth in the report of the Master (Rec. pp. 3 et. seq.) and the opinion of the Circuit Court of Appeals (Rec. pp. 110-111).

The Government asserted a preferential right with respect to the payment of these claims, both as against the mortgagees and all other creditors of the defendant railroad by virtue of Section 3466 of the Revised Statutes.

The right thus asserted was denied by the Master in a report and opinion of scholarly and exhaustive character in which the authorities were fully reviewed (Rec. pp. 3 et. seq.).

On exceptions to the Master's report, it was approved by Circuit Judge Booth, acting by assignment as District Judge (Rec. p. 88).

On appeal to the Circuit Court of Appeals of the Eighth Circuit, the Order and Decree of the lower Court was affirmed (Rec. p. 118).

It may be noted in passing that, as far as the tribunals below are concerned, there was no diversity or conflict with respect to the controlling principles. Each of the opinions rendered attested the significant circumstance, that those principles had been settled by the uniform course of decision in this and the lower Federal Courts almost from the date of the enactment of the statute under which the Government's claim of priority was made. Notwithstanding, the Government by the present application, is, in effect, seeking the review and reversal of principles as old as the law itself.

To demonstrate how devoid of significance the matters now presented by the Government really are, it is essential to broadly state what is necessarily inherent in its claims. This will serve the dual purpose of disclosing what are to be considered as the moot character of the issues as well as their severable character.

In asserting its claims of preference, the Government necessarily asserts preference in the following respects, viz:

First: Over the mortgages, the liens whereof had existed long previously to the time the Government's claims were created and in consequence, to the time when the preferential right could be asserted;

Second: Over the preferred creditors whose rights, if any, proceed from a conception of equitable liens, *having priority to the mortgages,* and the rights with respect to which were vested before the appointment of the receiver and thus before any right on the part of the Government to assert a preference, arose;

Third: Over the general creditors,—a right which could only exist in respect to the administration and distribution of the proceeds of unmortgaged assets.

That the claims thus asserted are independent and their determination may proceed from wholly independent principles is obvious. In considering the pending application, the severability of the questions thus suggested should not be overlooked. They may be briefly mentioned in the order stated.

I.

As to the Mortgage Bondholders.

This question has been decided by this Court, which has definitely held that the priority of the United States, under the statute, whenever it exists, is postponed to prior liens, including liens by mortgages.

United States v. Hooe, 3 Cranch 73 (1805).
Conard v. Atlantic Insurance Co., 1 Peters 386 (1828).
Field v. United States, 9 Peters 182 (1835).
Brent v. Bank of Washington, 10 Peters 596 (1836).

It is argued that while the Court has so stated the law, analysis of its decisions shows that support for the rule is found in dictum rather than in holding of the Court, and that the decisions in question were written when the common law theory prevailed—that a mortgage was a conveyance of title, eliminating the mortgaged property from the estate of the mortgagor,—thereby furnishing support for the asserted dictum, which theory has been abrogated in favor of the lien theory of mortgages. The rule, however, does not rest upon dictum, however well considered. *United States v. Hooe* necessarily decides that on insolvency and death the Government's priority does not over-ride a prior mortgage. *Conard v. Atlantic Insurance Company* decides that it does not override a maritime lien by respondentia. *Brent v. Bank of Washington* decides that it does not override a lien created by the by-laws of the Bank. There is no difference in substance between such liens and the legal liens of mortgages. It is true that a mortgage is no longer commonly regarded as a conveyance of property but neither is a respondentia and certainly a bank's lien on its own shares is not and never was such a conveyance.

The substance of the priority statute (Section 3466 R. S.) has been in force since 1797 (1 Stat. at Large, 515). For nearly one hundred and twenty-five years it has been the understanding of the Courts and of the Bar that the priority of the United States under it is subordinated to prior liens. This is demonstrated by numerous decisions (other than those above cited) as well as by various dicta of the Courts.

Savings & Loan Society v. Multnomah County, 169 U. S. 421, 428.

Cottrell v. Pierson, 12 Fed. 805.

United States v. Duncan, Fed. Cases 15,003, p. 935.

United States v. Lewis, Fed. Cases 15,595, p. 924.

Case of Jacob Richardson, 9 Opinions Attorney General, 28.

United States v. Delaware Insurance Co., Fed. Cases 14,942, p. 813.

United States v. Sheriff of Charleston, Fed. Cases 16,276, p. 1065.

United States v. Griswold, 8 Fed. 496.

Schmidtman v. Atlantic Phosphate & Oil Corp, 230 Fed. 769, p. 773.

This rule was followed by the Special Master, by the District Court and by the Circuit Court of Appeals which concludes its discussion of this feature of the case as follows:

> "We deem it to be established beyond dispute that priority claims of the United States, under Section 3466 R. S., are subordinate to the lien of a mortgage which attached before the indebtedness to the Government accrued." (Rec. p. 115.)

The fact that the present claims of the United States arise under the Transportation Act of 1920 does not differentiate the

case in any way. Neither the Federal Control Act nor the Transportation Act by their terms created any preferential right.

It is the belief of the mortgage trustees that no writ whatever should issue. Should the Court be of the opinion that the writ should be granted for any reason, however, it is respectfully urged that in any case the scope of the writ be limited so as to exclude a review of this already settled rule as to prior mortgage liens. The issuance of a writ without such limitation would be an almost insuperable bar to an early reorganization of this railroad property, which, as stated, has been in receivership since July, 1923.

II.

As to the Preferred Creditors.

The rights of creditors falling within this category, as well as the principles to which those rights are referable, have been considered by this court in a series of cases commencing with *Fosdick vs. Schall,* 99 U. S. 252 and ending with *Gregg vs. Metropolitan Trust Co.*, 197 U. S. 183. Such rights, broadly stated, are postulated of the general theory of an equitable lien on the income of the railroad during a limited period preceding a receivership, including diversions of that income during the same period either directly or indirectly, for the benefit of the mortgagees. The right thus recognized extends, upon application of the same equitable principles, to the net income of the receivership.

See

Virginia & A. Coal Co. vs. Central Ry. & Bkg. Co., 170 U. S. 355.

Southern Ry. Co. vs. Carnegie Steel Co., 176 U. S. 257.

It should be observed and emphasized that the working out of the rights and equities of this class of creditors presupposes the imposition of a lien in their favor on the mortgaged property *ahead of the mortgages.* The controversy in fact turns on determining the priority of lien as between this class and the mortgage creditors. In other words, there is, so to speak, superimposed upon the mortgage security, a prior equitable lien.

The same reasoning, therefore, which establishes the validity and priority of the mortgage liens, necessarily establishes the similar priority of the equitable liens of the preferred creditors against any asserted preferential right of the claims of the United States.

It is therefore evident that no question could arise in any case with respect to this feature, unless the proceeds realized from the foreclosure sale were more than sufficient to pay the full amount of the mortgage debt plus the amount of the preferred claims.

The equity established in favor of this class of claims is strictly limited, can be asserted only by those creditors bringing themselves within the legally prescribed conditions and is for their benefit and protection alone.

In deference to these seemingly obvious considerations, the Circuit Court of Appeals said in the instant case:

> "Holding, as they do, preferred rights under certain conditions over mortgages of record, it would seem illogical that they should be displaced by this governmental claim of priority, which, we think, is clearly inferior to the mortgage lien. These equitable rights attached and were a subsisting charge upon the assets of the railroad before the United States, in any view, was in a position to assert and enforce its claims. (Marshall, Rec. vs. People of the State of New York, 254 U. S. 380)." (Rec. p. 117.)

The grounds for invoking a review with respect to this class of creditors are as untenable as those already considered with respect to the mortgages.

The subject should similarly be excluded in considering the propriety of granting the writ here applied for.

III.

As to the General Creditors.

That no significance is ascribed to this particular feature under the circumstances of the instant case, sufficiently appears from the fact no allusion is made to unmortgaged assets. As far as this case is concerned, it is not believed that the present application would have been tendered to obtain a review of this single feature. In fact, the matter is apparently one of largely moot character.

Furthermore, and what should be decisive as far as this particular feature is concerned, it was neither involved nor passed upon under the decision here sought to be reviewed. This was indicated by the Circuit Court of Appeals in concluding its opinion as follows:

> "In as much as only holders of liens legal and equitable are before us on this appeal, and since it is conceded that the estate will not realize more than enough to discharge the mortgage indebtedness and preferred claims, we find it unnecessary to consider the effect of the decretal order upon general creditors." (Rec. p. 118.)

Conclusion.

Premised of the correctness of the matters thus suggested, it will be seen that any question of the interpretation of the Federal Control or Transportation Acts is unnecessary to the determination of the present issues. In fact, it might be said without fear of serious contradiction, that any such question is largely of academic significance in the present case. It is readily conceivable that this question may arise in other cases and under other circumstances. This, however, provides no justification for granting the present writ. Otherwise, as already stated, the effect would be to employ certiorari as a basis of eliciting advisory opinion.

As far as the abstract question of the statutes is concerned, we can add nothing to the able analysis of the Master (Rec. p. 51, et seq.) which was approved by Circuit Judge Booth (Rec. p. 88) and the reasoning of which was fully confirmed by the decision of the Circuit Court of Appeals.

For the reasons thus suggested, it is submitted that no basis is disclosed under the established rules for granting the pending petition. In any event, it is respectfully urged that the scope of a writ, if here granted, should be limited, having strict regard to the severability of the questions involved and in such wise that any review should exclude the reconsideration of long established and well settled general principles of law.

Respectfully submitted,

Edwin S. S. Sunderland,
Warren S. Carter,
Solicitors for Guaranty Trust Company,
Respondent.

HENRY V. POOR,
FREDERICK G. INGERSOLL,
Solicitors for Central Union Trust Co.,
Respondent.

JOSEPH M. HARTFIELD,
JESSE E. WAID,
NORTON M. CROSS,
KENNETH TAYLOR,
Solicitors for New York Trust Co.,
Respondent.

JAMES H. MCINTOSH,
CHARLES BUNN,
Solicitors for Bankers Trust Company,
Respondent.

EDWARD H. BLANC,
JAMES C. OTIS,
Solicitors for Farmers Loan & Trust Co.,
Respondent.

MORTIMER H. BOUTELLE,
Solicitor for W. H. Kalbach and Clara Sheriff, as Executors of the Estate of H. H. Sheriff,
Respondent.